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Supreme Court of the United States

OCTOBER TERM, 1940

No. 935

FIRST NATIONAL BANK OF TEMPLE,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of First National Bank of Temple respectfully shows:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit upon a fidelity bond for losses alleged to have been sustained by the dishonest acts of three of bank's employees. This is the second appeal of the case. On the first, the Circuit Court reversed a trial court's judgment based upon an in-

structed verdict for bonding company (100 F. (2d) 308), and latter's petition for certiorari was denied by this Court (307 U.S. 630, 59 S. Ct. 833). On the first appeal the Circuit Court held that the auditor appointed by the trial court testified, "as was his right, as an expert, and his testimony is also a *part* of the evidence in this case" (p. 309); that "Here we have a case where the employees of the new bank, three of them, disclosed their shortages and defalcations while they worked for the new bank. Moreover, they had disclosed how, from time to time, they covered deposits that came over from the old institution into the new bank. This went on until it could no longer be hidden. It was the old story of plunder and pillage that finally came to light. The preponderance of the evidence points to the guilt of the employees of the new bank. We are constrained to hold, after a careful consideration of all the evidence, that the trial court gave to the jury a directed verdict which was not supported by any substantial evidence." (p. 310).

The identical evidence was adduced at the second trial, same witnesses testified, and there was a plaintiff's judgment for $22,693.21 (R. 34). All the evidence showed, without dispute, that losses came into bank on or after its opening date, and while the bond was in force. All three employees admitted their guilt, and all three were convicted of making false entries as result of prosecutions in the same court where the civil case was tried, growing out of the identical transactions involved in this suit (R. 79, et seq). Petitioner reimbursed its cus-

tomers in the full amount of each and all of the ten items upon which jury's verdict was based (R. 166, 179, 183, 187, 196, 198, 203, 208, 265, and 210).

After repeatedly telling the jury that the burden was on the plaintiff to show by preponderance of the evidence that it sustained direct losses as alleged in the petition, and that the losses occurred within the coverage period of the time that the bond was in effect (R. 438, 440, 441), the trial court instructed that the testimony of the experts "was admissible as testimony of experts as relating to a matter that the jurors will themselves have to arrive at and determine, and in arriving at such determination you will take into consideration the testimony of all witnesses, including the testimony of all those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein in the ten items, and while the bond was in effect. This matter is an issue for your ultimate determination, based upon all the testimony offered on trial of the cause." (R. 439).

On the second trial, the Circuit Court reversed because experts were permitted to testify that in their opinion bank's assets were diminished contemporaneously with the suppression of the deposit tickets, and because of the court's charge advising the jury that they might consider such expert testimony in determining the ultimate issue of liability.

The Circuit Court held that the case was tried

"* * plus mainly the testimony of expert accountants * *" (R. 458), whereas the opposite situation obtained, and as we shall show, the evidence consisted principally of employees' confessions and admissions, the supporting documents and records, parts of the evidence from the three criminal trials, by consent, and the evidence developed by the examining auditor. The Circuit Court said (R. 459) that the examiner's report to the Court concluded that of the total loss of $17,769.89, $12,204.46 represented a shortage in petitioner's bank, and $5,577.51 represented a shortage in the old bank, whereas, unquestionably, the Court misread the examiner's report (R. 62) which stated that the total loss sustained by the plaintiff through the wrongful acts of the employees under the bond was $17,779.97 and of this amount $5,577.51 was carried forward into the accounts of the new bank from the old bank (R. 68); and after disallowing nine of the nineteen items originally sued for (R. 63-67), the examiner found that the remaining ten losses (R. 67) were sustained through wrongful acts of bank's employees.

B. STATEMENT DISCLOSING JURISDICTION

1. The statutory provision which sustains the jurisdiction of the Court is Section 240 of the Judicial Code, as amended February 13, 1925, being Section 347 (a), Title 28, U.S.C.A.

2. There was a diversity of citizenship, and because of the opposing opinions of the same Circuit Court of Appeals in the same case upon the same

questions, and because the opinion of the Circuit Court on the second appeal is in direct conflict, on the same questions, with prior decisions of this Court, and other Circuit Courts of Appeals, necessarily all questions involved in the cause are federal; and certiorari should be granted under Rule 38, paragraph 5, as hereinafter particularly shown.

3. The date of the judgment to be reversed is January 17, 1941. A petition for rehearing filed in the Circuit Court was denied on February 11, 1941 (R. 484).

4. The suit, civil in nature, and all rights and obligations of the parties, because of the matters recited in this section, wholly depended upon the rule of decision announced by this Court.

In reversing and remanding (R. 457), the Circuit Court held that the trial court erred in permitting the expert witnesses to testify to the effect that "the assets of the bank were reduced by the amount of the withheld deposit slips," since the jury could have reasonably understood, and probably did, that if they believed such statements then they might render judgment based thereon, while if the money actually went in the bank to cover previous shortages, the statement was not true, and the bank did not suffer diminution of assets. In so holding, the Circuit Court of Appeals has rendered a decision in conflict on the same matter, with the decision, among others, of the Circuit Court of Appeals, Tenth Circuit, in the case of *New York Life Insurance Com-*

pany vs. Doerksen, 64 F. (2d) 240; and with its own decision, on the same matter, in the same case, on the first appeal, *First National Bank of Temple vs. Continental Casualty Company*, 100 F. (2d) 308, cert. den., *Continental Casualty Company vs. First National Bank of Temple*, 307 U.S. 630, 59 S. Ct. 833. The Circuit Court of Appeals gave as its reason (R. 460) for reversing and remanding for new trial "that the experts should have been restricted to giving testimony as to what was actually done in each instance as revealed by the records and to explaining any technical matter involved in banking or accounting," and held that the trial court erred in instructing the jury that the testimony of the experts as to when losses occurred with reference to each of the ten items "was admissible as testimony of experts as relating to a matter that the jurors will themselves have to arrive at and determine, and in arriving at such determination you will take into consideration the testimony of all witnesses, including the testimony of all witnesses to whose testimony you will give credence, including those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein of the ten items, and while the bond was in effect. *This matter is an issue for your ultimate determination, based upon all the testimony offered on trial of the cause.*" (R. 439).

In thus holding, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decision of this Court in,

among others, *Transportation Line vs. Hope*, 95 U.S. 297, and with the decision of this Court in *The Conqueror*, 17 S. Ct. 510.

In so holding and in considering only a portion of the trial court's charge, the decision of the Circuit Court is in direct conflict on the same matter with the decision of the Circuit Court in *S. S. Kresge Co. vs. McCallion* (8th cir.), 58 F. (2d) 931; and in so holding, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decision of this court in *Seaboard Airline Railroad vs. Clara V. Padgett*, 236 U.S. 668, 35 S. Ct. 481. Such holding of the Circuit Court of Appeals is in direct conflict on the same matter with its own decision, without holding it to be palpably wrong, rendered on the first appeal, in *First National Bank of Temple vs. Continental Casualty Company*, supra.

In reversing and remanding the Circuit Court decided that a fair interpretation of the language of the bond required plaintiff below to establish, as a condition to recovery, an actual present loss (R. 459). In so holding, the Circuit Court of Appeals has rendered a decision in conflict on the same matter with the decision, among others, of the Circuit Court of Appeals, 4th Cir., in *People's Bank of Sanford, N. C., vs. Fidelity & Deposit Company of Maryland*, 72 F. (2d) 932.

In reversing and remanding for new trial, the Circuit Court held that "on the other hand, if the

money actually went into the bank to cover a previous shortage or withdrawal, then the statement was not true (that the assets of the bank were reduced by the amount of the withheld deposit slips), and the bank did not suffer diminution of its assets (R. 460)." In so deciding, the Circuit Court of Appeals is in direct conflict, on the same matter, in the same case, within its own decision, without holding it to be manifestly wrong, rendered on the first appeal; and in so holding, the Circuit Court of Appeals rejected the decision of the Supreme Court of Texas upon an important question of local law rendered in *Royal Indemnity Company, et al., vs. North Texas National Bank et al.*, 34 S.W. (2d) 249, quoted and approved by the Circuit Court on the first appeal, 100 F. (2d) at page 310.

In reversing and remanding the case, the Circuit Court of Appeals decided that from the testimony of the experts the assets of the bank were reduced by the amount of the withheld deposit slips the jury could have reasonably understood and probably did that if they believed such statements, then they might render judgment based thereon, and that on the other hand if the money actually went into the bank to cover a previous shortage or withdrawal, then the statement was not true and the bank did not suffer diminution of its assets (R. 460). In thus speculatively deciding, the Circuit Court is in direct conflict on the same matter with the decision, among others, of the Circuit Court of Appeals, Ninth Circuit, in *United States vs. Holland*, 111 F. (2d) 949, and in so holding, the Circuit Court has rendered a

decision upon an established federal question of long existence, in a way probably in conflict with the applicable decision of this Court in *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231.

The decision as to the effect, both actually and probably, upon the minds of the jury by the expert testimony was beyond the province of the Circuit Court, is in direct conflict on the same matter, with the decision, among many others, of the Circuit Courts of Appeals in *United States vs. Dudley*, 64 F. (2d) 743, and *United States vs. Holland*, 111 F. (2d) 949; and such holding of the Circuit Court contrarily decides an established federal question of long standing, in a way probably in conflict with the applicable decisions of this Court in *Aetna Life Insurance Company vs. Ward*, 11 S. Ct. 720, and *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231. The conclusions of the Circuit Court of Appeals, as quoted, are so evidently erroneous as to require correction by this Court. *Baugham vs. New York P. & N. R. Co.*, 241 U.S. 237, 36 S. Ct. 592.

C. QUESTIONS PRESENTED

(1) Whether the trial court committed reversible error in permitting the expert witnesses to testify to the effect that: "The assets (of the bank) were reduced by the amount of the withheld deposit slips?"

(2) Whether the trial court committed reversible error in failing to restrict the testimony of the experts to what was actually done in each instance

as revealed by the records, and to explaining any technical matter involved in banking or accounting, or whether under the fact situation the trial court properly permitted experts to testify as to their opinion concerning the effect on the bank's assets when its employees withheld customers' deposit slips?

(3) Whether the trial court's charge to the jury that the testimony of the experts as to when losses occurred with reference to each of the ten items "was admissible as testimony of experts as relating to a matter that the jurors will themselves have to arrive at and determine, and in arriving at such determination you will take into consideration the testimony of all witnesses, including the testimony of all witnesses, to whose testimony you will give credence, including those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein of the ten items, and while the bond was in effect. This matter is an issue for your ultimate determination, based upon all the testimony offered on trial of the cause," was, under the fact situation, right; and whether such charge was, contrary to the decision of the Circuit Court, a properly submitted limitation upon the value and effect of the testimony of the experts?

(4) Whether the trial court's charge, as a whole, and not the isolated portion considered by and quoted in the Circuit Court's opinion, fairly submitted the issues and presented to the jury the determination of the ultimate questions of liability?

(5) Whether the Circuit Court's interpretation of the language of the bond, as applied to the case, required the bank in order to recover, to establish an actual present loss, or whether the bank was not required to show the exact time and manner when the losses occurred, provided it showed by fair preponderance of the evidence that they were sustained during the currency of the bond?

(6) Whether the Circuit Court was right in reversing and remanding the case when the undisputed evidence showed that the Lastovica loss (Item No. 1) was a cash cage shortage, twice confessed and established by national bank examiner, who counted his cash?

(7) Whether the Circuit Court was right in failing to hold that, without reference to the evidence of experts, plaintiff established by the clear preponderance of the evidence that it sustained the losses, sued for, while the bond was in full force and effect?

(8) Whether the Circuit Court was right in reversing and remanding the cause, holding that "on the other hand, if the money actually went into the bank to cover a previous shortage or withdrawal, then the statement was not true and the bank did not suffer diminution of its assets," when the jury had passed upon that very issue, and its verdict, without resorting to expert testimony, was amply supported by the overwhelming preponderance of the evidence?

(9) Whether the Circuit Court was right in overruling its decision on the first appeal, without holding such decision to be palpably wrong?

(10) Whether the Circuit Court was right in overruling its decision on the former appeal that where there were shortages in the predecessor bank and the employees there took money and afterwards came into the new bank as employees and covered their defalcations in the old bank by taking the money of the new bank, the bonding company was liable without holding such decision palpably wrong, and without holding the rule of decision in Texas, upon which the first opinion was grounded, stated in *Royal Indemnity Company, et al, vs. North Texas National Bank, et al,* (Tex. App.) 34 S.W. 249, likewise was wrong.

D. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

(1) Because the decision of the Circuit Court of Appeals that the experts should have been restricted to giving testimony as to what was actually done in each instance as revealed by the records and to explaining any technical matter involved in banking or accounting, and that the trial court erred in permitting them to testify that "the assets of the bank were reduced by the amount of the withheld deposit slips, since the jury could have reasonably understood and probably did that if they believed such statements, then they might render judgment based thereon: while if the money actually went into

bank to cover previous shortage or withdrawal, then the statement was not true and the bank did not suffer diminution of its assets," is in direct conflict with the applicable decision of this Court in *Transportation Line vs. Hope*, 95 U.S. 297, where it was decided that it is permissible to ask questions of an expert witness which cannot be put to any ordinary witness, and that it is no valid objection that one is asked a question involving the point to be decided by the jury.

Such decision is in conflict on the same matter with the decision of the Circuit Court of Appeals, Tenth Circuit, in the case of *New York Life Insurance Company vs. Doerksen*, 64 F. (2d) 240, where it was held that it is no objection that the opinion elicited from an expert is upon an issue or point to be decided by the jury; and such decision is in conflict on the same matter in the same case with the Circuit Court's first decision in *First National Bank of Temple vs. Continental Casualty Company*, supra, where the same Court held that Upleger, accountant appointed by the trial court, testified, as was his right, as an expert as to the origin, development and occurrence of the losses.

In deciding what the effect, actual and probable, of the experts' testimony was upon the mental processes of the jury, the Circuit Court has decided an elementary proposition of law directly in conflict, on the same matter, with the decisions, among many others, of the Circuit Courts of Appeals in *United States vs. Dudley*, 64 F. (2d) 743, and *United States*

vs. Holland, 111 F. (2d) 949; and such decision is in direct conflict with the applicable decisions of this Court rendered in *Aetna Life Insurance Company vs. Ward*, 11 S. Ct. 720, and *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231.

(2) Because the decision of the Circuit Court that the trial Court committed reversible error in instructing the jury, "That testimony (of the experts) was admissible as testimony of experts as relating to a matter that the jurors will themselves have to arrive at and determine, and in arriving at such determination you will take into consideration the testimony of all witnesses, including the testimony of all witnesses to whose testimony you will give credence, including those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein of the ten items, and while the bond was in effect. This matter is an issue for your ultimate determination, based upon all of the testimony offered on trial of the cause," is in direct conflict with the applicable decisions of this Court rendered in *Forsyth vs. Doolittle*, 120 U.S. 73, 7 S. Ct. 408, and *The Conqueror*, 17 S. Ct. 510, where this Court approved a charge of startling likeness, which instructed the jury that they were not bound by the experts' testimony, but that it was proper to consider the same as a part of the proof bearing upon the issues as the testimony of experienced men in aid of the determination of the ultimate questions submitted.

(3) Because such decision of the Circuit Court

upon an isolated portion of the trial court's charge that reversible error was committed in so instructing the jury, is in conflict with the applicable decision of this Court in *Seaboard Airline Railroad vs. Clara V. Padgett*, 236 U.S. 668, 35 S. Ct. 481; and in conflict on the same matter with the decision of the Circuit Court, Eighth Circuit, in *S. S. Kresge Co. vs. McCallion*, 58 F. (2d) 931, where it was decided as a fundamental and universal proposition of law, that the whole of a trial court's charge must be considered, and not fragments thereof, in the determination of whether or not issues were properly submitted.

(4) Because the decision of the Circuit Court of Appeals that a fair interpretation of the language of the bond required plaintiff below to establish, as a condition to recovery, an actual present loss, is in direct conflict on the same matter with its own decision on the first appeal, and with the decision, among others, of the Circuit Court of Appeals, Fourth Circuit, in *Peoples Bank of Sanford, N. C., vs. Fidelity & Deposit Company of Maryland*, 74 F. (2d) 932, where it was held that it was not necessary that the insured show the exact time when the losses occurred, and that it was not required as a condition precedent to establishment of liability that the exact time and manner of abstractions be proven, provided that the preponderance of the evidence fixed the time of losses within the currency of the bond.

(5) Because the decision of the Circuit Court

of Appeals that "On the other hand, if the money actually went into the bank to cover a previous shortage or withdrawal, then the statement was not true (that the assets of the bank were reduced by the amount of the withheld deposit slips), and the bank did not suffer diminution of its assets," is in direct conflict on the same matter in the same case, with its prior decision, and such holding erroneously decides an important question of local law directly in conflict with an applicable local decision of the Supreme Court of Texas in *Royal Indemnity Company et al vs. North Texas National Bank, et al*, 34 S.W. (2d) 249, where it was held that where there was shortage in the predecessor bank and employees there took customers' money, afterwards came into new bank, and there covered their defalcations in old bank by giving credits in new bank to such depositors of old bank, liability on bond was fixed.

(6) Because the decision of the Circuit Court of Appeals that from the admitted testimony of experts, the jury could have reasonably understood and probably did that if they believed such statements, then they might render judgment based thereon, while, on the other hand, if the money actually went into bank to cover a previous shortage or withdrawal, then the statement was not true, and the bank did not suffer diminution of its assets, is in direct conflict on the same matter with the decision of the Circuit Court of Appeals, Ninth Circuit, in *United State vs. Holland*, 111 F. (2d) 949; and in so holding the Circuit Court has overruled and established

federal doctrine of long life in a way probably in conflict with the applicable decision of this Court in *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231, where it is held that a federal court may not substitute its own views of the evidence, there being substantial evidence to support the jury's verdict, and that it is immaterial what the appellate court's verdict would have been as jurors, or whether it may be that the evidence preponderates one way or the other.

(7) Because the evidence on the second trial being unchanged, the decision of the Circuit Court of Appeals overturning its first decision without holding it palpably wrong, was erroneous; and the law of the case as announced on the first appeal was binding upon the appellate court except to correct manifest error, in whole or in part.

(8) The Circuit Court of Appeals erred in holding

a. That plaintiff, as the result of an "overnight reorganization," was the successor to a previous bank, because the same is against the record and against the stipulation of the parties (R. 76) to the effect that the predecessor bank's affairs had been closed for months prior to plaintiff's organization, and that its assets, under the direction and with the approval of the Comptroller, were purchased by plaintiff pursuant to an approved plan to un-freeze old bank's assets.

b. That petitioner's assets were not contemporaneously withdrawn by its employees at the time

of the suppression of the deposit tickets, only if they, at that time, "had actually withheld or withdrawn the money represented by the tickets;" and "If, on the other hand, they had placed it with the cash and given some other depositor credit therefor, in order to cover up money previously withheld or withdrawn and charged to the latter's account, the bank's assets would neither have been increased nor diminished, because, while it would have reduced its liability to the one whose funds had previously been taken, by the same act, it would have become liable to the new depositor, for the amount represented by this deposit slip or entry in his bank book. * * *", because the clear preponderance of the evidence, if not the undisputed evidence, showed that the bond was effective on September 22, 1933, and continued in force until after all losses were discovered, and that during this period, when the bond was current, all the losses sued upon occurred, and during this time petitioner's depositors sustained losses in their accounts, for which they were reimbursed in the identical amounts claimed under the bond, and these same accounts were embraced in the jury's verdict.

Petitioner believes the Circuit Court committed other errors in deciding the case, as set forth in its petition for rehearing in that court, which are not here stated as against condensation, but, in compliance with the rule of this Court, petitioner now refers to, and by adoption includes herein, the matters presented in its petition for rehearing in the Circuit Court, and prays that the same be considered as effectually as if embraced herein.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain, therein to be named, a full and complete transcript of the Record and proceedings in the case, numbered and entitled on its docket, No. 9476, *Continental Casualty Company, Appellant, vs. First National Bank of Temple, Appellee*, and that such judgment of said Circuit Court of Appeals for the Fifth Circuit be reversed by this Honorable Court, that the judgment of the trial court be affirmed, and your petitioner have such other and further relief in the premises as to this Honorable Court should seem meet and just.

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